***THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY**

W.P.No. 1303 of 2005

% 07-02-2005

M. Krishna & another

..... Petitioner

Vs.

$ 1. A.P. Co-operative Tribunal, Hyderabad and others

… Respondents

! Counsel for the petitioner : Sri Vedula Venkata Ramana

^ Counsel for Respondent Nos.1,2 and 6 : G.P.for Cooperation

Counsel for Respondent No.5: Sri Nuty Ramamohana Rao

Counsel for Respondent No.4 : Sri D.V. Bhadram

<Gist :

>Head Note :

? AIR 1971 SC 2337

AIR 1984 AP 159

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE SEVENTH DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION NO : 1303 of 2005

Between:

1 M. Krishna, S/o. M. Ramesham,
R/o. 1-4-181, Balajinagar, Jagityal, Karimnagar District.
2 M. Virupakshi, W/o. M. Ramesham,
R/o. 1-4-181, Balajinagar, Jagityal, Karimnagar District.

..... PETITIONERS

AND

1 A.P. Cooperative Tribunal, Hyderabad.
2 Dy. Registrar of Co-op. Societies/OSD, The Charminar Co-op. Urban

Bank Ltd., Purani Haveli, Hyderabad.
3 Shaik Yaqoob Hussain, Co-operative Sub-Registrar/Sale Officer, The

Charminar Co-op. Urban Bank Ltd.,11-3-161, 2nd Floor, Nampally

Branch, Beside Badi Masjid, New Mallepally, Hyderabad.
4 M/s. Shyam Trading Company, rep by its Proprietor, Shyam Chandak,

S/o. Laxminarayan Chandak,
R/o. 60, Asbestos Colony, Karkhana Road, Secunderabad, presently

staying in R.No. 31, Hotel Tajmahal,
S.D. Road, Secunderabad.
5 The Charminar Co-op. Urban Bank Ltd. rep by its Managing Director,

12-2-831/9, Neeraj Complex, Mehdipatnam, Hyderabad.
6 Government of Andhra Pradesh, rep by its Secretary, Law and

Legislative Affairs, Secretariat, Hyderabad.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Certiorari or any other appropriate writ and quash the Judgment of the 1st respondent in CTA No. 61 of 2003 dated 22-11-2004, if necessary by declaring that Rule 52 of the A.P. Cooperative Societies Rules which confers a right of appeal against the sale certificate issued by the sale officer is ultra vires the provisions of the A.P. Cooperative Societies Act, 1964 and hence void and grant such other relief as it deems fit in the circumstances of the case.

Counsel for the Petitioner:MR.VEDULA VENKATARAMANA

Counsel for the Respondents No.1,2 and 6: GP FOR COOPERATION

Counsel for Respondent NO.4 : Sri D.V.Bhadram

Counsel for Responent No.5: Sri Nuty Ramamohana Rao

The Court at the stage of admission made the following:

THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY

W.P.NO. 1303 OF 2005

ORDER:

Petitioners challenge the order, dated 22.11.2004, passed by the A.P. Co-operative Tribunal (for short 'the Tribunal'), the first respondent, in C.T.A.No.61 of 2003. As an alternative prayer, they seek a declaration that Rule 52 of the A.P. Co-operative Societies Rules, 1964 (for short 'the Rules') is u*ltra vires* the provisions of the A.P. Co-operative Societies Act, 1964 (for short 'the Act').

The facts that gave rise to the filing of this writ petition, in brief, are as under:

The fourth respondent borrowed a sum of Rs.25,00,000/- from Co-operative Urban Bank Limited, Hyderabad (for short 'the Bank'), the fifth respondent, in the year 1998. There was default in repayment of the same. Therefore, the Bank initiated proceedings for recovery of the amount. An Award dated 06.05.2000 in A.R.C.No.81 of 2000 was passed by the Deputy Registrar of Co-operative Societies, the second respondent, holding that the fourth respondent is liable to pay a sum of Rs.27,24,810/- with interest, that accrued thereon. The fourth respondent filed C.T.A. (SR).No. 6370 of 2001 against the Award. The Tribunal granted an order of conditional stay. However, the condition was not complied with and the order of stay became inoperative.

The Bank initiated execution proceedings in E.P.No.21 of 2001 against the fourth respondent. The mortgaged property was proposed for sale. Initially, a sale notice was issued on 23.01.2002. In view of the stay granted by the Tribunal, the sale was not proceeded with. On the failure of the fourth respondent to comply with the condition, and the cessation of stay, a second sale notice was published on 11.04.2002 fixing the date of auction as 24.04.2002. The auction was not held on that day. Thereafter, another sale notice was published on 01.08.2002 fixing the date of auction as 24.08.2002. The petitioners participated in the auction jointly and they emerged as the successful bidders for a sum of Rs.31,00,000/-.

The fourth respondent filed W.P. No. 15814 of 2002 in this Court challenging the auction notice dated 01.08.2002 issued in E.P.No.21 of 2001. The writ petition was disposed of on 06.09.2002 at the admission stage. The fourth respondent undertook to pay the outstanding amount by 07.01.2003 and the Bank undertook not to proceed with the same till that time. The undertakings were recorded. A default clause was added to the effect that if the petitioner fails to make the payment, as agreed, the Bank shall be at liberty to proceed with the sale. The fourth respondent filed W.P.M.P.No.2747 of 2003 in that writ petition seeking extension of time. Through order, dated 10.02.2003, the time was extended up to 25.02.2003. He did not deposit the amount within the extended time also.

The sale in favour of the petitioners was confirmed and a sale certificate was issued on 10.02.2003. Questioning the same, the fourth respondent filed

C.T.A.No.61 of 2003. Through its order, dated 22.11.2004, the Tribunal had set aside the sale certificate. The sale officer was directed to conduct the sale by issuing a fresh proclamation, duly following the procedure.

Sri Vedula Venkataramana, learned counsel for the petitioners, submits that the fourth respondent committed default in payment of the amount and did not comply with the conditions imposed by this Court in W.P.No.15814 of 2002, filed by him. He also contends that the fourth respondent has raised several contentions in that writ petition, while challenging the sale notice dated 01.08.2002, and it was not open to him, to raise the same or other potential grounds, in the appeal before the Tribunal. The learned counsel submits that the Tribunal has drawn several inferences and recorded findings to the effect that fraud was played in the process of sale, without there being any material. Placing reliance upon the Judgments of this Court and the Supreme Court, he contends that the execution of sale under Rule 52 of the Rules is similar to the one under Order 21 C.P.C. and unless any material irregularity has taken place or any prejudice is suffered by the defaulter, the sale cannot be interfered with.

Sri D.V. Bhadram, learned counsel for the fourth respondent appeared at the admission stage itself, filed counter-affidavit and addressed extensive arguments. He submits that under Rule 52(11)(e), it is mandatory that the sale notice shall be given maintaining at least a clear 30 days of time between the date of sale and the date of notification and in the instant case it was not followed. The learned counsel submits that there was non-compliance with the conditions of sale, particularly in relation to the deposit of EMD of Rs.25,000/-. According to him, the amount of Rs.25,000/- was required to be deposited by 24.08.2002, whereas the petitioners deposited the same on 26.08.2002. He further submits that the second petitioner did not participate in the auction and still a sale certificate was issued in her favour, along with the first petitioner. He ultimately submits that the Tribunal considered the matter from the correct perspective and no interference is called for.

Sri Nuti Ramamohana Rao, learned standing counsel for the Bank, submits that the fourth respondent was given ample opportunity to repay the amount and still he did not avail the same. He contends that the Sale Officer, the third respondent, followed the procedure meticulously and the Tribunal did not take into account, certain important facts, before it recorded finding that the sale

was vitiated.

Learned Government Pleader for Cooperation submits that the Tribunal has taken into account, the mandatory provisions of the Act and the Rules and found that the sale in favour of the petitioners was vitiated and that the impugned order does not suffer from any illegality or infirmity.

The property belonging to the fourth respondent was brought to sale under the relevant provisions of the Act and the Rules, on account of the default committed by him. It is not in dispute that the fourth respondent filed an appeal before the Tribunal against the Award passed by the second respondent and that the conditions imposed in the order of stay granted therein were not complied with. It was in this context that the sale, in pursuance of the first sale notice dated 23.01.2002, could not be proceeded with. After the stay granted in favour of the petitioners stood vacated, because of the default committed by the fourth respondent, a second sale notice was issued on 11.04.2002. The date of sale was fixed as 24.04.2002. The sale could not take place for a variety of reasons. Thereafter, a third notice was issued on 01.08.2002 and the sale was conducted on 24.08.2002. The petitioners emerged as the successful bidders in the auction.

Two days before the date of sale i.e. on 22.08.2002, the fourth respondent filed W.P.No.15814 of 2002 challenging the sale notice dated 01.08.2002. The writ petition was disposed of, at the admission state, on 06.09.2002. By that time, the auction took place, but the sale was not confirmed. The fourth respondent undertook to pay the amount due to the Bank by 01.07.2003 and the latter, in turn, undertook not to proceed with the sale. A default clause was added. He committed default and the undertaking given by the Bank not to proceed with the sale became inoperative. It was in this context that a sale certificate dated 10.02.2003 was issued.

On 10.02.2003 itself, the fourth respondent moved this Court seeking extension of time stipulated in the order in W.P.No.15814 of 2002. The time for depositing the amount was extended. The learned standing counsel submits that on account of change of incumbents, the developments that took place between

07.01.2003 and 10.02.2003 were not brought to this Court when the time was extended and on the next day itself a W.P.M.P. was filed stating the fact that the sale has already been finalized and that a sale certificate was issued.

The fourth respondent did not pay the amount within the time extended by this Court. If he felt aggrieved by the issuance of sale certificate, in the normal course of things, he ought to have moved an appropriate application before this Court. However, he has chosen to avail the remedy of appeal before the Tribunal. Rule 52 of the Rules is broadly comparable to Order 21 C.P.C. It runs into 14 printed pages and contains 25 sub-rules. Some of the Sub-Rules contain numerous clauses. A sale brought about under the Rule becomes final, on issuance of a sale certificate. Rule 52(14)(6) provides that the order of confirmation of sale shall be final, subject to an appeal under Section 76 of the Act. The fourth respondent availed the remedy, under that provision. Though the petitioners took an objection as to the maintainability of the appeal, filed a writ petition on earlier occasion and canvassed the same ground in this writ petition also, this Court is not impressed upon, to take the view that such a provision is u*ltra vires* the Act. It is arguable that an appeal is the creation of a statute and unless specifically provided for under the Act, its scope cannot be widened through a delegated legislation. But it should not be forgotten that when the delegated legislation itself is so elaborate as to supplement several details, provision of appeals or other remedies become necessary, to ensure fairness and legality to such proceedings. Providing for a remedy of an appeal or revision through a delegated legislation is not prohibited in law, except where the parent Act clearly bars such a remedy. Hence, that question need not detain the discussion any longer.

The Tribunal framed three points as under:

1. Whether the sale officer committed material defects in the sale and confirmation of sale proceedings?

2. Whether the appellant made out any grounds in prima facie to establish that the respondents played collective fraud in sale and confirmation of sale proceedings?

3. Whether any material mistakes and defects committed during the sale proceedings which caused any prejudice effecting the rights of appellant?

It held all the three points against the petitioners. Therefore, it needs to be seen as to whether the said findings are proper and correct.

In relation to point No.1, the Tribunal took the view that the auction notice dated 01.08.2002 is contrary to Rule 52(11)(e), inasmuch as the time between the date of notice and the date of auction is less than 30 days. It is true that Rule 52(11)(e) requires that there should at least be 30 days of time between the date of sale notice and the date of sale. In this regard, two subsidiary issues arise.

The first sale notice was issued on 23.01.2002. In that clear 30 days was maintained between the date of notice and the date of sale. The sale could not take place, on account of the stay obtained by the fourth respondent. Thereafter, a notice, dated 11.04.2002, was issued fixing the date of auction as 24.04.2002. The petitioners did not object to the same. It is a different matter that the sale did not take place in pursuance of this notice also. All the same, the fourth respondent can be deemed to have, in a way, acquiesced in such a notice and waived the objection as to the maintenance of minimum time gap. The third notice was issued on 01.08.2002.

Firstly, whenever the statute prescribes a time limit in relation to issuing notices for convening meetings, conducting sales etc., the object is to provide requisite time to the affected parties to deal with the situation. Such a purpose can be said to have been served, once it is complied with. It is rather difficult to expect compliance with the same rigor in relation to the subsequent and deferred steps also. Such a course would hamper the very implementation of the provisions of the Act. If the time gap is maintained in the initial notice, it is not necessary or mandatory that the same time gap be maintained at subsequent stages. While in some statutes such a facility is expressly provided, in other cases it is implied. Reference may be made in this context, to the postponed elections, deferred meetings etc.

The second subsidiary issue is that the fourth respondent specifically questioned the validity of the notice, dated 01.08.2002, before this Court in W.P.No.15814 of 2002. Even if he has not raised any question as to the maintenance of time gap between the date of sale notice and the date of

auction, he is deemed to have raised it and the entire issue is presumed to have been decided finally, by this Court. The fourth respondent is precluded from raising that issue before the Tribunal. Such a plea is barred by operation of principle of *res judicata* or constructive *res judicata*. Therefore, it was not open to the fourth respondent to raise that plea before the Tribunal. At the most, he could have canvassed any illegality or infirmity, if any, of the sale certificate and not the matters anterior thereto, which constituted the subject matter of W.P.No.15814 of 2002. Therefore, the finding of the Tribunal on point No.1 cannot be sustained.

On point No.2, the Tribunal held that the Sale Officer and the Bank have collectively played fraud on the fourth respondent. This conclusion was based on the fact that the Bank accepted for extension of time from 07.01.2003 to 25.02.2003 but has confirmed the sale on 10.02.2003. This finding cannot be sustained, for the reason that aggrieved parties, viz. the petitioners herein, were not parties to W.P.No.15814 of 2002 and that on 11.02.2003 itself, the Bank filed W.P.M.P. before this Court narrating the factum of issuance of sale certificate in favour of the petitioners. At any rate, the fourth respondent did not pay the amount even by the extended date i.e. 25.02.2003.

Now remains the third point. The finding of the Tribunal on this point is based on the various irregularities said to have been taken place in the sale. The Tribunal referred to the several alleged omissions, which are not attributable to the petitioners. On some aspects, which were not certain, it gave benefit of doubt to the fourth respondent. It pointed out that the second petitioner was not an auction purchaser and issuance of sale certificate in her favour is improper. It needs to be noticed that a joint bid was presented by one Ramesam and his son M. Krishna, the first petitioner. The second petitioner is none other than the wife of Ramesam and mother of the first petitioner. As an internal arrangement, they wanted the sale certificate to be issued in the name of the petitioners. It was not as if any stranger or third party was inducted.

Learned counsel for the fourth respondent strenuously contended that the petitioners did not deposit the EMD on 24.08.2002 and that the deposit was made only on 26.08.2002. The sale notice stipulated that only such persons who make a deposit of Rs.25,000/- as EMD, shall be entitled to participate in

the auction. The petitioners placed before the Tribunal, a voucher dated 24.08.2002 as proof of payment of EMD. The learned counsel for the fourth respondent relied upon a voucher dated 26.08.2002 for a sum of Rs.25,000/- and contended that the EMD was paid two days subsequent to the date of auction. On a perusal of the same, it became clear that the said amount of Rs.25,000/- was paid by the fourth respondent on 26.08.2002 and not by the petitioners. Therefore, the contention advanced by the fourth respondent in this regard does not hold any weight.

As observed earlier, the procedure prescribed under Rule 52 is broadly similar to the one under Order 21 C.P.C. In *Radhy Shyam v. Shyam Behari Singh*, the Supreme Court held that it is only when the Judgment debtor suffers any injury to his rights, that execution of sale can be interfered with, and not where no such injury is proved. The relevant passage reads as under:

> "Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realized in such a sale, in other words injury, is, therefore, not sufficient. What has to be established is that there was not only inadequacy of the price but that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity."

This principle was applied by this Court in *V.V.Narayan Chetty v. Nenla Dhanamma and another*. The procedure under Rule 52 is less vigorous compared to the one under Order 21 C.P.C., because of the reason that the transactions between the Societies and its members are properly secured. On an examination of the facts of the present case, it emerges that the fourth respondent was afforded with several opportunities by the Tribunal, this Court, and on several occasions, by the Bank itself, to pay the amount. He did not avail the facility extended to him by this Court in W.P.No.15814 of 2002. He did not exhibit any *bona fides* on his part in complying with the orders secured by himself. He cannot plead his own defaults and lapses to set at naught the execution proceedings. The appeal preferred by the fourth respondent against the Award is also said to have been dismissed. He may be having his own difficulties in paying the amount. However, once the loan transaction was secured and the proceedings were initiated in accordance with the provisions of

the Act and the Rules, they cannot be protracted unendingly. The petitioners have deposited the entire sale consideration and this Court does not find any material irregularity in the sale. The tribunal adopted too technical an approach in the proceedings and set aside the sale.

For the foregoing reasons, the writ petition is allowed and the order in C.T.A. No. 61 of 2003 is set aside. There shall be no order as to costs.

.02.2005

Note:

Mark LR copies.

(BO)

ksld

To

One fair copy to the Hon'ble Sri Justice L. Narasimha Reddy (for His Lordships kind perusal)

1 A.P. Cooperative Tribunal, Hyderabad.
2 The Dy. Registrar of Co-op. Societies/OSD, The Charminar Co-op. Urban Bank Ltd., Purani Haveli, Hyderabad.
3 Shaik Yaqoob Hussain, Co-operative Sub-Registrar/Sale Officer, The Charminar Co-op. Urban Bank Ltd.,11-3-161, 2nd Floor, Nampally Branch, Beside Badi Masjid, New Mallepally, Hyderabad.
4 Managing Director, The Charminar Co-op. Urban Bank Ltd., 12-2-831/9, Neeraj Complex, Mehdipatnam, Hyderabad.
5 The Secretary, Law and Legislative Affairs, Government of Andhra Pradesh, Secretariat, Hyderabad.

6 8 L. R. copies.

7 The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

8 The Secretary, A.P. Advocates' Association Library, High Court Buildings, Hyderabad.

9 Two C.Cs. to the Government Pleader for Cooperation, High Court of A.P., Hyderabad (OUT).

10 Two C.D. Copies.